tude merely because they appear as accused before me. They have given evidence on oath. The position thus is that I am unable to say that I disbelieve the accused and my mind is not free from doubt as to the voluntary nature of the confessions. In the result I hold that Exhibits P11 and P14 are not admissible and they will not be read, heard or used at the hearing of this trial.

Confessions rejected.

Solicitors: *Devadas & Co.*

RE BADRI BIN ABAS

[R. Cr. J. (Sharma J.] October 27, 1970)

Criminal Law and Procedure — Sentence — Binding over — Whether discretion exercised — Criminal Procedure Code (Cap. 6), s. 173A.

In this case the accused pleaded guilty to an offence under section 448 of the Penal Code and the learned magistrate convicted him and bound him over under section 173A of the Criminal Procedure Code.

Held: the discretion of the court to act under section 173A of the Criminal Procedure Code could only be exercised according to the circumstances of the case. There was no evidence to show that by reason of the character, antecedents and the circumstances under which the accused committed the offence, it was expedient to act under the section in this case and therefore the order of the learned magistrate must be set aside.

Case referred to:-

(1) *Public Prosecutor* v. *Idris* [1955] M.L.J. 234.

CRIMINAL REVISION

Ahmad Fairuz bin Dato Sheikh Abdul Halim (Deputy Public Prosecutor) for the Public Prosecutor.

T. Thalayasingam for the accused.

Sharma J. (delivering oral judgment): The accused in this case was charged under section 448 of the Penal Code. He pleaded guilty but the learned magistrate bound him over under section 173A of the Criminal Procedure Code and yet recorded a conviction. I called for the records in revision as I thought it was not a proper exercise of discretion by the learned magistrate under section 173A of the Criminal Procedure Code.

Section 173A(ii) of the Criminal Procedure Code reads as follows:

"When any person is charged before the court with an offence punishable by such court, and the court finds that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to record a conviction, make an order either —

(a) dismissing the charge or complaint after such admonition or caution to the offender as to the court seems fit; or

(b) discharging the offender conditionally on his entering into a bond with or without sureties, to be of good behaviour and to appear for the conviction to be recorded and for the sentence when called upon at any time during such period, not exceeding three years, as may be specified in the order."

There is a clear distinction between section 173A and section 294 of the Criminal Procedure Code and that was very clearly pointed out by Thomson J. (as he then was) in the case of *Public Prosecutor* v. *Idris*[1] where he said:

"The case in itself was of no importance but for the benefit of magistrates I feel I should make a few observations on the subject of sections 173A and 294 of the Criminal Procedure Code.

There is a certain amount of overlapping between the two sections in the sense that very often a case may be appropriately dealt with under either of them. There are, however, certain differences which must be carefully observed.

Section 173A is applicable in all cases triable in the magistrate's court irrespective of the nature of the prescribed punishment and it is to be observed that where it is proposed to exercise the powers given by it the court should not proceed to conviction.

Section 294 on the other hand, which only applies in the case of adult offenders, can only be made use of where a person has been convicted and where his conviction is for an offence punishable with imprisonment without the option of a fine.

I do not wish to lay down any hard and fast rule, which in any event would be difficult to prove, but magistrates would be well-advised only to make use of section 294 where an offence which is generally of a serious nature and which is punishable with imprisonment has been committed by an adult offender (*i.e.* an offender of 16 years or over) and where it is considered desirable to place him on probation.

All other cases which are thought to call for unusually lenient treatment can be more appropriately dealt with under the provisions of section 173A. In this connection, however, it is to be observed that generally speaking where an offence has been committed it calls for punishment and that in the case of the numerous statutory offences punishable by a fine the appropriate way of dealing with cases that are not in themselves very serious is the imposition of a fine adjusted in amount according to the view taken of the seriousness of the offence."

The object of punishment as has been so often said, is two-fold, first the prevention of offences and secondly the reformation of the offender. Punishment would become a greater evil if, instead of reforming the offender, it is likely to harden him by repeating the crime and thus causing possibly an irreparable injury not only to himself but also tending to defeat the object of punishment. Section 173A, I think, is primarily aimed at dealing leniently with first offenders who are not guilty of offences which are not so serious by giving such persons a chance of reformation which they would lose if they were sent to prison. A person convicted of an offence cannot, however, as of right claim the benefit of section 173A. The exercise of the power is entirely in the discretion of the court and can only be exercised according to the circumstances of each case. The legislature has very clearly enumerated that the age, character, antecedents of the offender, the circumstances in which the offence was committed, the physical or mental condition of the offender, the trivial nature of the offence if it be so, or other extenuating circumstances under which the offence was committed should be taken into consideration while exercising the discretion under this section. An exercise of discretion under this section requires a considerable sense of

responsibility and courts should not allow themselves to be misled into applying this section by any misplaced sense of leniency or sympathy. The public must not be led to suppose that any offender may commit any crime without any fear of punishment. If there are circumstances which indicate that the accused had succumbed to a sudden temptation, or the offence committed by him was committed only as a result of a sudden uncontrollable impulse, or it was the result of sheer thoughtlessness, it may afford some reason to exercise discretion under section 173A. These are quite a few of the considerations which may be taken into account. The list can never be exhaustive. There may be innumerable situations and circumstances depending on the facts of a particular case and it is upon those circumstances that the court should exercise its proper judgment.

I am of the view that action cannot be taken under section 173A on the ground of the age of the offender alone unless there is placed on the record material to show that by reason of the character, antecedents and the circumstances under which the accused committed the offence, it was expedient to act under that section. There is no such record in this particular case and the age of the accused is also not one where the court could be favourably inclined to exercise its discretion either under section 173A or section 294 of the Criminal Procedure Code, as he is 36 years of age. A person may be led astray or inadvertently act under an evil influence. That may be a case in which the powers under section 173A of the Criminal Procedure Code may be invoked. There is nothing of that sort in this case. From a plain reading of section 173A of the Criminal Procedure Code I find that the intention of the legislature in inserting that provision was to indicate the lines on which the discretion of the court should be exercised. It was not meant, in my view, to be applied indiscriminately to all first offenders. An offence under section 448 of the Penal Code is not an offence of a trivial nature and the circumstances under which the accused committed it in this case do not at all warrant the exercise of any discretion in his favour.

The order I propose to make in this case is that the order of the learned magistrate be set aside and the case be sent back for retrial before another magistrate. The accused will appear before the magistrate at Batu Pahat on the 2nd November, 1970 when the case will come up for mention. He is allowed bail in the sum of $300 with one surety.

Retrial ordered.

Solicitors: *T. Thalayasingam & Co.*

YUSOFF BIN SIDIN v. PUBLIC PROSECUTOR

[A.Cr.J. (Sharma J.) October 27. 1970]

[Muar — Criminal Appeal No. 19 of 1970]

Criminal Law and Procedure — Statements — Cross-examination of witness of previous statements — Criminal Procedure Code (Cap. 6) s. 113(ii) — Evidence Ordinance, 1950, s. 145(1).

The only way in which a previous statement of a witness can be used is by contradicting the witness by such writing and this can be only by drawing his attention to such parts of the recorded statement as are intended to be used for the purpose of contradiction and allowing him an opportunity to explain any contradiction. Those parts of the statement which are used for contradicting the witness must be proved and brought on the record.

If the procedure prescribed by section 145 of the Evidence Ordinance is not adopted and the witness's attention is not drawn to the written record, it cannot be used as evidence.

Cases referred to:-

(1) *Chung Khiaw Bank Ltd.* v. *Public Prosecutor* [1968] 2 M.L.J. 196, F.C.

(2) *How Kee Kiat* v. *Collector of Land Revenue* [1913] 1 F.M.S.L.R. 105 at p. 110.

CRIMINAL APPEAL.

T. K. Lim for the appellant.

Ahmad Fairuz bin Dato Sheikh Abdul Halim (Deputy Public Prosecutor) for the respondent.

Sharma J. (delivering oral judgment): This appeal has been withdrawn and is consequently struck out but there arises a point of some importance in this appeal which concerns the way in which the credit of a witness is required to be impeached under section 113(ii) of the Criminal Procedure Code. Under section 113(ii) of the Criminal Procedure Code the word "may" when it relates to procedure means "must". This was so stated by McIntyre F.J. in the case of *Chung Khiaw Bank Ltd.* v. *Public Prosecutor*(1) quoting the case of *How Kee Kiat* v. *The Collector of Land Revenue.*(2)

The credit of a witness under section 113(ii) of the Criminal Procedure Code can thus only be impeached in the manner provided by the Evidence Ordinance, *i.e.* as provided under section 145(1) of the Evidence Ordinance, which reads as follows:

"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without such writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

A prosecution or defence witness cannot be merely asked whether he made a previous statement to the contrary to the investigating officer and the matter left there. That answer of the witness cannot be used as evidence. The only way in which the previous statement can be used is *by contradicting the witness by such writing* and this can be only by drawing his attention to such parts of the recorded statement as are intended to be used for the purpose of contradiction and allowing him an opportunity to explain any contradition. Those parts of the statement which are used for contradicting the witness must be *proved and brought on the record.* Where, however, there is no direct contradiction between what is said to the police and what is said in court and the contradiction consists only in an omission, the said omission can be proved by bringing on record the whole of the statement given in court. Further, the statement of a witness cannot be used in court for the purpose of determining the weight to be attached to the testimony of the witness unless it has been proved by either the